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NO. 71-808

IN THE

Supreme Court of the United States

October Term, 1971

FLUOR WESTERN, INC., *Petitioner*

v.

G & H OFFSHORE TOWING CO., INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:

ROYSTON, RAYZOR & COOK
3710 One Shell Plaza
Houston, Texas 77002

M. L. COOK
3710 One Shell Plaza
Houston, Texas 77002

Counsel for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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To The Honorable Justices Of Said Court:

The Respondent, G & H Offshore Towing Co., Inc., respectfully submits that Fluor Western, Inc.'s Petition for Writ of Certiorari should be denied for the following reasons:

1. The decisions below in this matter are not in conflict with *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) nor with *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Company*, 372 U.S. 697 (1963).

2. The decisions below in this matter are not in conflict with the decisions of other lower Courts, more particularly, *Complaint of Twenty Grand Offshore Co., Inc.*, 320 F. Supp. 1385 (S.D. Fla., 1971).

RESTATEMENT OF THE CASE

It is believed necessary to clarify several matters concerning the factual situation in this case before beginning a discussion of the reasons that the Petition for Certiorari should be denied. It has been stipulated that the real parties at interest in this matter are the insurance underwriters, proceeding in the name of their assured, for amounts paid to their assured, Fluor Western, Inc., as a result of the sinking of a barge and loss of its cargo on March 10, 1966. Under an agreement between Fluor Western, Inc., and the barge owner, Pace, it was agreed that Fluor would obtain cargo insurance, which insurance should contain a waiver of subrogation against the barge owner, the towing tug, and the barges themselves. Such a waiver was obtained, but the insurance underwriters decided to prosecute this subrogation action, nevertheless.

REASONS FOR DENYING THE WRIT

I.

The contractual arrangements in this case are entirely different from those in the *Bisso* and *Dixilyn* cases. *Bisso* involved a release-towage agreement, and not a waiver of subrogation. A release-towage agreement, of course, merely shifts liability for negligent towage from the tug to the towed object and does not concern insurance coverage in any manner. It is beyond dispute that a tower could insure for its benefit and the benefit of the barges, the cargo

laden on such barges or other parties concerned with the tow for the benefit of itself and the other parties. In such a case, any loss sustained during the venture would be borne by underwriters. Exactly the same result is obtained by the agreements in this matter, and to reach a different result, the Courts below would have essentially had to have held that the tug could not have insured itself for its own negligence.

The *Bisso* case involved an agreement directly between the tug and its tow in which the tug had contractually insulated itself from its own negligence. Such a contract is altogether different from one in which an insurance underwriter waives its right to claim against one causing a loss, the former having been held to be contrary to public policy in the *Bisso* case, the latter merely requiring the underwriter to pay for the loss which he had agreed to insure in such agreement, a function for which insurance companies are formed. An additional consideration involved in *Bisso* which is not involved in this case is that *Bisso* was predicated in part on an adhesive contract, whereas Appellant in the case at hand has stipulated that he "does not claim or intend to claim that the contract in question here was exacted in violation of the policy against adhesive contracts." *Dixilyn* involved the same type of agreement as was involved in *Bisso*, and thus both *Dixilyn* and *Bisso* are clearly inapposite.

II.

Likewise, the lower Court decision which Petitioner alleges is in conflict with the decisions of the lower Courts in the instant case, *Petition of Twenty Grand Offshore Co., Inc.* is clearly distinguishable, as the Court in *Twenty Grand*, writing through its Chief Judge, Judge

Fulton, noted. In distinguishing our case, the Court stated:

> "In Fluor it developed that Fluor's cargo insurer was by virtue of subrogation the real party in interest in whose name—not Fluor—the action was actually brought (citation omitted). It further appeared that Fluor's cargo insurer, the real party in interest plaintiff, voluntarily waived its subrogation in dealings with its insured Fluor and not as a party to the towage agreement. This being so the *Bisso* and subsequent cases were held to have no application contra to the contention advanced by the cargo interests in *Fluor*. In the instant case before the Court, the Plaintiff in limitation seeks to enforce insurance contractual provisions in the towage agreement against Claimant, Carriers, who did not perform the provisions and no underwriter of whom waived, voluntarily or otherwise, subrogation against Twenty Grand.
>
> The Court is of the opinion that the holding in *Fluor* is distinguishable from the present case before the Court in that here there is no waiver of subrogation by an insurer and Plaintiff, Twenty Grand, seeks to enforce provisions of a towage agreement against a party to the towage agreement to which the *Bisso* line of cases are applicable (Citation Omitted). . . . (320 F.Supp. 1385, 1387).

The distinctions between our case and *Dixilyn*, *Bisso* and *Twenty Grand*, are not fictional as the Petitioner alleges. The Fifth Circuit in its per curiam ruling merely recognized that the appeal from the District Court's opinion was effectively dealt with by the District Court which reached the proper decision that the *Bisso* and *Dixilyn* rationale are inapplicable here.

CONCLUSION

There is no reason for this Court to grant Certiorari in this matter. The matter brought here for review is merely one in which an insurance underwriter seeks to abrogate the very contract to which it agreed. Neither *Bisso* nor *Dixilyn* holds that the contract agreed upon between the insurer and those at interest in the towing venture is in any way contrary to public policy and the Respondent, therefore, respectfully submits that the Petition for a Writ of Certiorari should be denied.

M. L. COOK

Of Counsel:

ROYSTON, RAYZOR & COOK
3710 One Shell Plaza
Houston, Texas 77002
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify on this 28 day of December, 1971, a copy of the foregoing Respondent's Brief was mailed to Mr. James Ross, Ross, Griggs & Harrison, Chamber of Commerce Building, Houston, Texas 77002.

Of Royston, Rayzor & Cook